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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICHAEL GRECCO
PRODUCTIONS INC.,

Plaintiff,

v.

TIKTOK, INC.,

Defendant.

Case No. 2:24-CV-04837-FLA-MAR

**DEFENDANT'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT OR
PARTIAL SUMMARY JUDGMENT**

Hon. Fernando L. Aenlle-Rocha

Date: September 26, 2025

Time: 1:30pm

Courtroom: 6B

Filed concurrently with:

(1) Notice of Motion and Motion;

(2) Defendant's Statement of
Uncontroverted Facts

(3) Declaration of Jemili Boutos;

(4) Declaration of J. Michael Keyes; and

(5) [Proposed] Order

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1 **I. INTRODUCTION**

2 Plaintiff Michael Grecco Productions, Inc. (“Plaintiff” or “MGP”)—and its
3 sole owner, Mr. Michael Grecco (“Grecco”)—are serial litigants that have filed
4 hundreds of copyright infringement cases in federal court. Plaintiff purports to own
5 the copyrights to various photographs of celebrities—captured by Grecco in the
6 1980s to early 2000s. Plaintiff weaponizes threats of and actual litigation to force
7 third parties to pay inflated fees to “license” Plaintiff’s images. Its latest target is
8 Defendant TikTok, Inc. (“Defendant” or “TTI”).

9 Plaintiff alleges TTI infringed 22 of its photographs, yet the photographs
10 appear for a fleeting second or two in short transformative mash-up videos posted by
11 individual users on the TikTok platform. A handful of the rest are small “thumbnail”
12 profile images. It is undisputed TTI did not generate *any* revenue from these videos
13 or thumbnails. And, there is no evidence to suggest this content impacted Plaintiff’s
14 ability to license these photographs. In fact, nearly all Plaintiff’s purported prior
15 licenses are coerced settlements that have no bearing on the value of the photographs
16 or Plaintiff’s ability to license them in the open market. The transformative short
17 videos and thumbnails at issue are quintessential “fair use” under Section 107 of the
18 Copyright Act.¹ Given these undisputed facts, TTI moves for summary judgment on
19 three issues.

20 First, Grecco admitted in his deposition he did not consider fair use at all
21 before demanding TTI take down the content at issue. Grecco has such disdain for
22 the fair use doctrine that he calls it the “FU defense” and claims it is “BS.” The Ninth
23 Circuit disagrees. As explained in its seminal *Lenz* decision, fair use is enshrined in
24 the Copyright Act and provides substantive rights to those that post content online.
25 As such, copyright owners have an affirmative duty to consider fair use before
26 sending takedown notices. This is not a superfluous or trivial obligation. Plaintiff’s

27 _____
28 ¹ Defendant understands Plaintiff plans to move for summary judgment and will
address the fair use factors in response to that motion.

1 refusal and failure to consider fair use makes the notices invalid and ineffective at
2 putting TTI on “actual notice” of the alleged infringement. Therefore, TTI is entitled
3 to summary judgment on all of Plaintiff’s claims.

4 Second, summary judgment is necessary on Plaintiff’s claim for vicarious
5 infringement because there is *zero* evidence that TTI received direct financial benefit
6 from the alleged direct infringement by its users. The use of Plaintiff’s images for a
7 matter of seconds in user-generated videos and in a handful of thumbnails did not
8 draw consumers or otherwise generate revenue for TTI. This is fatal to Plaintiff’s
9 claim.

10 Third, even if Plaintiff were to prevail on liability—it will not—Plaintiff is not
11 entitled to recover actual damages. The undisputed facts show TTI did not derive
12 any revenue from the alleged infringement, so Plaintiff cannot recover TTI’s profits.
13 In addition, because Plaintiff failed to produce any evidence of what a willing
14 licensee like TTI or its users would pay to license the photographs at issue, Plaintiff’s
15 actual damages are entirely speculative. Instead, Plaintiff relies on a “shopping cart
16 tool” it admits *no one has ever used*, as well as coerced “retroactive licenses” entered
17 into under threat of litigation. TTI is entitled to partial summary judgment on
18 Plaintiff’s claim for actual damages.

19 **II. FACTUAL BACKGROUND**

20 **A. Defendant’s TikTok Entertainment Platform and Services**

21 TTI provides the popular TikTok entertainment platform (“Tiktok”) in the
22 United States. Defendant’s Statement of Uncontroverted Facts (“DSOUF”) No. 1.

23 [REDACTED]
24 [REDACTED] *Id.* Nos. 4–5. Through Tiktok, users can
25 interact with videos and other content relating to a wide variety of topics, including
26 politics, comedy, educational content, news, and more. *Id.* No. 6.

27 TTI has no interest in permitting copyright infringement by Tiktok users and
28 has implemented policies and procedures that prohibit infringing content. Tiktok

1 users are subject to TTI’s Copyright Policy. *Id.* No. 7; Boutros Decl., Exh. 1 at 5
2 (“As a condition of your access to and use of [TikTok], you agree to the terms of the
3 Copyright Policy”). The Copyright Policy informs users that TTI does “not allow
4 any content that infringes copyright” and establishes procedures for reporting
5 infringement. DSOUF Nos. 8–11. Namely, copyright owners are directed to “file a
6 Copyright Infringement Report to request the removal of alleged infringing content
7 from TikTok via [an] online form or in-app” and are advised that such reports must
8 comply with the Digital Millenium Copyright Act (“DMCA”) and must meet all “the
9 statutory requirements necessary for reporting copyright infringement.” DSOUF
10 Nos. 10–12; Boutros Decl., Exh. 2 at 2. The Copyright Policy also instructs that
11 copyright owners “should consider whether the content you want to report may be a
12 permissible use of your copyright” and “submitting a misleading or fraudulent report
13 will result in your report being denied.” DSOUF No. 13–14; Boutros Decl., Exh. 2
14 at 2. TTI received over 400,000 copyright takedown notices in 2023 and over
15 500,000 in 2024, approximately 60% of which were deemed meritorious and
16 complied with. DSOUF Nos. 15–18. [REDACTED]

17 [REDACTED]
18 [REDACTED] *Id.* Nos. 19–21.

19 Subject to certain requirements, TikTok users can join the TikTok Creator
20 Program. *Id.* No. 74. Through this Program, TikTok users can monetize their content
21 on TikTok. *Id.* No. 75. However, TTI itself does not generate profits from the
22 Program. *Id.* Nos. 76–79.

23 **B. Plaintiff’s Copyright Litigation Business and the Asserted**
24 **Works**

25 Plaintiff is “a litigious and opportunistic copyright holder.” *Golden v. Michael*
26 *Grecco Prods.*, 524 F. Supp. 3d 52, 65 (E.D.N.Y. 2021). It has no employees; it
27 merely holds and enforces copyrights for photographs created by its sole owner
28 Grecco. DSOUF No. 26, 28, 34. Plaintiff has filed well over 100 copyright litigation

lawsuits. *Id.* No. 34. It relies on an army of independent contractors—most located overseas—to find alleged infringements, paying them commissions per infringing use identified. *Id.* No. 38. Grecco’s wife manages Plaintiff’s team to discover infringement claims and receives a commission from each settlement or court order resulting therefrom. *Id.* No. 39. Plaintiff’s administrator, Ms. Torina Yamada, also receives commissions for each alleged act of infringement she locates. *Id.* Nos. 39–40. Plaintiff has generated at least \$5 million from its litigation tactics. *Id.* No. 35. The vast majority of this revenue comes from settlement agreements and default judgments. *Id.* No. 37. Plaintiff has never tried any of its copyright claims to a verdict. *Id.* No. 36.

Plaintiff alleges it owns copyrights to 22 photographs at issue here, which Plaintiff refers to as the First Photograph through the Twenty-Second Photograph (collectively the “Asserted Works”). *Id.* No. 29. The Asserted Works are photographs of celebrities that Grecco captured in the 1980s, the 1990s, or early 2000s. *Id.* Nos. 30–31. Examples include Lucy Lawless in her *Xena Warrior Princess* costume, David Duchovny and Gillian Anderson from *The X-Files*, Michael Jackson performing at a concert, the bands *Til Tuesday* and *En Vogue*, and headshots of actors Andy Garcia, Morgan Freeman, and Jet Li. Dkt. 46 ¶¶ 12–54. Grecco was commissioned by third parties (generally, film and television studios or magazines) to capture each of the Asserted Works. Dkt. 46 at ¶¶ 12–55; DSOUF No. 33.²

C. The Alleged Infringement At Issue

Plaintiff alleges 25 TikTok users have posted content to Tiktok that include the Asserted Works. DSOUF Nos. 43–44. Twenty TikTok users allegedly infringed by including an Asserted Work, or portions thereof, for a few seconds within videos

² These promotional photographs were commissioned by studios for the purpose of widely publicizing the films and television shows at issue. Having planted seeds of this widespread dissemination long ago, Grecco has, without a hint of irony, made a multi-million-dollar business out of scanning the internet and suing anyone who unwittingly used these promotional photographs.

1 they posted to TikTok. *Id.* No. 46. Additionally, five TikTok users allegedly
2 infringed by using a cropped version of an Asserted Work as their thumbnail profile
3 pictures. *Id.* No. 47.

4 It is undisputed that TTI neither created nor posted any of Asserted Works.³
5 *Id.* Nos. 44–45. Rather, each alleged infringement is user-created content posted to
6 TikTok by the user. *Id.* Nos. 44–47. TTI did not and does not derive any revenue
7 from the alleged infringement. *Id.* Nos. 76–79. None of the allegedly infringing uses
8 of the Asserted Works are advertisements, nor been used to promote or sell any
9 products. *Id.* Nos. 71–73.

10 Plaintiff sent TTI takedown notices for each alleged infringement.⁴ *Id.* No. 48.
11 Each takedown notice was prepared by Plaintiff’s contractors with a template using
12 the same boilerplate language. *Id.* Nos. 51–58. Grecco himself is responsible for
13 determining whether a use of Plaintiff’s works is fair use and approving all of
14 Plaintiff’s takedown notices before they are sent. *Id.* No. 61. However, Grecco did
15 not even review each alleged act of infringement before his contractors sent the
16 takedown notices. *Id.* No. 63. Nor did Grecco review the takedown notices. *Id.*
17 No. 62. Most importantly, Grecco expressly *did not consider* fair use before his
18 contractors submitted the takedown notices. *Id.* No. 64. In fact, Grecco testified the
19 fair use defense is “BS” and referred to by Plaintiff as the “FU defense.” *Id.* Nos.
20 65–66.

21 Plaintiff’s failure to consider fair use is further demonstrated by the
22 “automated” system it uses for sending takedown notices to TTI. *Id.* Nos. 59. If
23 Plaintiff’s contractors find content on TikTok featuring one of Plaintiff’s
24 photographs, the contractors are authorized to send a takedown notice if the use is

25 ³ Plaintiff’s direct copyright infringement claim was dismissed for this reason.
26 *See* Dkt. 45 at 6.

27 ⁴ Plaintiff claimed in discovery it has no documents relating to its decision to send
28 the takedown notices to TTI. Keyes Decl., Exh. 9 (Response to Request for
Production No. 23).

1 not licensed. *Id.* Nos. 60. That is exactly what happened here and, as repeatedly
2 admitted by Grecco, Plaintiff did not consider fair use before submitting takedown
3 notices. Yet, Plaintiff submitted takedown notices to TTI and, as it has with hundreds
4 of other defendants, initiated this litigation in attempt to extract a settlement.⁵

5 **III. LEGAL STANDARD**

6 “The Court shall grant summary judgment if the movant shows that there is no
7 genuine dispute as to any material fact and the movant is entitled to judgment as a
8 matter of law.” Fed. R. Civ. P. 56(a). The moving party “bears the initial
9 responsibility of informing the district court of the basis for its motion, and
10 identifying those portions” of the factual record that “demonstrate the absence of a
11 genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

12 “Summary judgment for a defendant is appropriate when the plaintiff ‘fails to
13 make a showing sufficient to establish the existence of an element essential to [its]
14 case, and on which it will bear the burden of proof at trial.’ *Cleaveland v. Pol’y*
15 *Mgmt. Sys., Corp.*, 526 U.S. 795, 805–06 (1999) (quoting *Celotex*, 477 U.S. at 322).
16 Accordingly, summary judgment is appropriate on any issues for which plaintiff
17 “does not have enough evidence of an essential element to carry its burden of
18 persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d
19 1099, 1102 (9th Cir. 2000).

20 ///

21 ///

22 ///

23 ⁵

24 [REDACTED] DSOUF Nos.
25 20–21.

26 *Id.* Nos. 22–23.

27 [REDACTED] TTI determined the
28 alleged acts of infringement are fair use and did not need to be removed (although
many were since removed for other reasons). *Id.* No. 24.

1 **IV. ARGUMENT**

2 **A. Plaintiff's Takedown Notices are Ineffective Because**
3 **Plaintiff Admittedly Did Not Consider Fair Use as Required**
4 **by The DMCA and Ninth Circuit Precedent**

5 Plaintiff's takedown notices do not comply with the Sections 512(c)(3)(A)(v)
6 and (vi) of the DMCA as a matter of law because Plaintiff admittedly did not consider
7 fair use before sending them. The legally defective notices were insufficient to
8 trigger an online service provider's expeditious removal requirement under the
9 DMCA because "fair use is 'authorized by the law' and a copyright holder must
10 consider the existence of fair use before sending a takedown notification under
11 § 512(c)." *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016)
12 (emphasis added). Summary judgment is therefore appropriate on Plaintiff's
13 secondary liability claims.

14 *1. Binding Ninth Circuit Precedent Requires Consideration of Fair*
15 *Use Before Sending a "Takedown Notice"*

16 Section 512(c)(3) of the DMCA establishes several requirements for
17 "takedown notices" to be "effective," including in relevant part:

18 (v) A statement that the complaining party *has a good faith belief that*
19 *use of the material in the manner complained of is not authorized by*
20 *the copyright owner, its agent, or the law.*

21 (vi) *A statement that the information in the notification is accurate, and*
22 *under penalty of perjury, that the complaining party is authorized to act*
23 *on behalf of the owner of an exclusive right that is allegedly infringed.*

24 17 U.S.C. 512(c)(3)(A)(v)–(vi) (emphasis added). The DMCA also provides an
25 "exclusionary rule" under Sections 512(c)(3)(B):

26 [A] notification from a copyright owner or from a person authorized
27 to act on behalf of the copyright owner that fails to *comply*
28 *substantially with the provisions of subparagraph (A) shall not be*
considered under paragraph (1)(A) in determining whether a service
provider has actual knowledge or is aware of facts or circumstances
from which infringing activity is apparent.

1 17 U.S.C. 512(c)(3)(B) (emphasis added). This Circuit has relied on the DMCA’s
2 legislative history to hold “[t]he statute [] signals that substantial compliance means
3 substantial compliance with *all* of § 512(c)(3)’s clauses, not just some of them.”
4 *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (citing H.R. Rep., at
5 56). Indeed, the legislature explained why the exclusionary rule applies to the kinds
6 of deficient notices like those sent by Plaintiff. S. Rep. 105-190 (1998) confirms
7 “neither actual knowledge nor awareness of a red flag may be imputed to a service
8 provider based on information from a copyright owner or its agent that does not
9 comply with the notification provisions.” *Id.* at 45. This Circuit has similarly defined
10 the statute’s “substantial compliance” standard as follows:

11 Compliance is not “substantial” if the notice provided complies with
12 only some of the requirements of § 512(c)(3)(A). . . . In order to
13 substantially comply with § 512(c)(3)’s requirements, a notification
14 must do more than identify infringing files. The DMCA requires a
15 complainant to declare, under penalty of perjury, that he is authorized
to represent the copyright holder, and that he has a good-faith belief
that the use is infringing. This requirement is not superfluous.

16 *CCBill*, 488 F.3d at 1112 (examining Section 512(c)(3)(B)(ii) on appeal of a district
17 court granting a motion for summary judgment). Thus, the Ninth Circuit is clear that
18 a claimant must comply with *all* of Section 512(c)(3)’s requirements in order to
19 substantially comply for purposes of the exclusionary rule, including the good-faith
20 belief requirement. *Id.*

21 *Lenz v. Universal Music Corp.* emphasized that if a copyright holder fails to
22 contemplate fair use before submitting a takedown notice, it cannot meet the good-
23 faith belief requirement under Section 512(c)(A)(v). 815 F.3d 1145 (9th Cir. 2016).
24 “[B]ecause 17 U.S.C. § 107 created a type of non-infringing use, fair use is
25 ‘authorized by the law’ and a copyright holder must consider the existence of fair use
26 before sending a takedown notification under § 512(c).” *Id.* at 1153 (emphasis
27 added). The validity of a plaintiff’s good-faith belief “lies not in whether a court
28

1 would adjudge the video as a fair use, but whether [the copyright holder] formed a
2 good-faith belief that it was not.” *Id.* at 1153 (citing *Rossi v. Motion Picture Ass’n*
3 *of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)). This inquiry, although fact
4 intensive, may be resolved on summary judgment when the circumstances do not
5 present any triable issue of fact as to “whether the analysis [the plaintiff] did conduct
6 of the [alleged infringing material] was sufficient . . . to form a subjective good-faith
7 belief that the video was infringing on [the] copyright.” *See id.* at 1154 n.3.

8 This Circuit has held that “to trigger the expeditious removal requirement”
9 under the DMCA in the first instance, “a copyright owner’s notification [to the
10 internet service provider] must substantially comply with the requirements of
11 subsection [512](c)(3)(A). . . .” *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d
12 597, 612 (9th Cir. 2018). In other words, an internet service provider has no
13 obligation to remove material if it receives ineffective takedown notices. *See id.*

14 2. *Plaintiff’s Takedown Notices are Ineffective as a Matter of Law*
15 *Because Plaintiff Admittedly Did Not Consider Fair Use*

16 Although whether a party formed a good-faith belief of infringement is often
17 fact dependent, here it is undisputed. Grecco squarely admitted that he *did not*
18 *consider fair use* before Plaintiff sent the takedown notices. Indeed, he did not even
19 review the allegedly infringing content or the takedown notices. Those admissions
20 preclude him from having formed a good-faith belief of infringement at the time
21 Plaintiff sent its takedown notices, rendering the notices ineffective as a matter of
22 law.

23 Plaintiff’s takedown notices were created using a template and include the
24 same boilerplate language:

25 *I have a good-faith belief that the use of the material that appears on*
26 *the service is not authorized by me, by my agent, or by operation of law.*
27 *I declare under penalty of perjury, pursuant to the laws of the United*
28 *States of America, that this notification is true and accurate. . . .*

DSOUF Nos. 55, 57; Keyes Decl., Exh. 12. However, Grecco provided the following testimony at his deposition:

Q: And it's your position that the allegations of infringement in these DMCA notices were true and accurate even though you did not consider fair use before sending these DMCA notices; right?

....

A: Correct. I still don't consider fair use; correct.

Grecco Depo. at 260:18–21, 23–24; DSOUF No. 64. In fact, Grecco testified he did not even review each of the alleged infringements. DSOUF No. 63. He went on to criticize the fair use doctrine:

[T]hat's a BS defense that every infringer [who] has no defense uses and we hear every day. That's like—we call it the FU defense for a reason.

Grecco Depo. at 211:6–8; DSOUF Nos. 65–66. Finally, Grecco testified Plaintiff's process for sending takedown notices to TTI is "automated," and the only factor Plaintiff considers is whether the TikTok user has a license from Plaintiff. DSOUF Nos. 59–60; Grecco Depo. at 209:6–7 ("its automated that, if there's no license, [then] they send a takedown notice"). Grecco's testimony demonstrates Plaintiff knew about the fair use doctrine, did not consider it when submitting its takedown notice, and consciously refused to do so.

Grecco's frank admissions render Plaintiff's notices deficient and ineffective as a matter of law because no reasonable jury could find that Plaintiff formed a subjective good-faith belief about each video's lack of fair use before the notices were sent. Grecco's admissions that Plaintiff did not consider fair use *or even review each of the allegedly infringing videos* refutes the boilerplate "good faith" attestation and accuracy statements in Plaintiff's takedown notices.

Because Plaintiff admittedly failed to comply with Section 512(c)(A)'s good-faith belief and accuracy requirements, Plaintiff's notices are ineffective under the DMCA and did not trigger any obligation owed by Defendant. *Ventura Content, Ltd.*, 885 F.3d at 612.

1 3. *Plaintiff’s Ineffective Takedown Notice Cannot Serve As*
2 *Evidence of Defendant’s Knowledge of or Ability to Identify the*
3 *Alleged Infringement Under the DMCA’s Exclusionary Rule*

4 The Ninth Circuit explained “[a] service provider shall not be liable for
5 monetary relief” if it does not know of infringement.” *CCBill*, 488 F.3d at 1111
6 (quoting Section 512(c)); see *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 746 (9th
7 Cir. 2019) (the control prong for vicarious copyright infringement requires the ability
8 to “identify infringing [] photos among the many photos that users saved or uploaded
9 daily”). A takedown notice can generally serve as evidence of the service provider’s
10 knowledge; however, “[a] service provider may . . . refute th[at] knowledge by
11 showing that the notice failed to substantially comply with the DMCA’s notice
12 requirements.” *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D.
13 Wash. 2004) (citing 17 U.S.C § 512(c)(3)(B)); see also *Hendrickson v. Amazon.com,*
14 *Inc.*, 298 F. Supp. 2d 914, 917–918 (C.D. Cal. 2003). For example, a service provider
15 may invoke Section 512(c)(3)(B)’s exclusionary rule that prohibits consideration of
16 deficient notices for purposes of “determining whether a service provider has actual
17 knowledge or is aware of facts and circumstances from which infringing activity is
18 apparent.” *UMG Recordings, Inc. v. Shelter Capital Partners Ltd. Liab. Co.*, 718
19 F.3d 1006, 1022 (9th Cir. 2013) (citing 17 U.S.C. § 512(c)(3)(B)(i) and H.R. Rep.
20 No. 105–551, pt. 2, at 56).

21 As explained, Plaintiff’s notices contain false good-faith belief and accuracy
22 statements. “Where [a defendant] cannot reasonably verify a claim of infringement,
23 either because of a possible fair use defense . . . or the copyright holder’s failure to
24 provide the necessary documentation to show that there is a likely infringement, the
25 operator’s lack of knowledge will be found reasonable and there will be no liability
26 for contributory infringement for allowing the continued distribution of the works on
27 its system.” *Religious Tech. Ctr. v. NetCom On-Line Comm. Servs.*, 907 F. Supp.
28 1361, 1364 (N.D. Cal. 1995). Such is the case here. See *McGucken v. Shutterstock*,

1 *Inc.*, 2023 U.S. Dist. LEXIS 177213, at *24 (S.D.N.Y. Sep. 30, 2023) (holding an
2 improper DMCA notice does not “trigger[a d]efendant’s Section 512(c)(1)(C)
3 obligation to ‘expeditiously . . . remove, or disable access to, the material that is
4 claimed to be infringing.’”); *Arista Records, Inc. v. MP3Board, Inc.*, 00 Civ. 4660
5 (SHS), 2002 U.S. Dist. LEXIS 16165, at *24–30 (S.D.N.Y. Aug. 28, 2002) (holding
6 that certain attempted DMCA notices were insufficient and therefore failed to put the
7 defendant on notice of any infringement for purposes of contributory infringement).
8 This result is appropriate because this Circuit “do[es] not require a service provider
9 to start potentially invasive proceedings if the complainant is unwilling to
10 state . . . that he has a good-faith belief that the material is unlicensed.” *CCBill*, 488
11 F.3d at 1112.

12 In sum, the law requires an online service provider to be on notice of the
13 infringement to be held liable for secondary infringement. *VHT*, 918 F.3d at 745–
14 746. A takedown notice can put the defendant on notice, but only if the notice is
15 “effective,” i.e., fully compliant with Section 512(c) of the DMCA. That requires,
16 *inter alia*, attesting to a good-faith belief that the use was not authorized by law.
17 17 U.S.C. § 512(c)(3)(A); *CCBill*, 488 F.3d at 1112. Plaintiff’s notices were
18 ineffective because Plaintiff did not consider fair use at all, let alone in good faith,
19 before sending them. The ineffective takedown notices cannot confer knowledge on
20 TTI and Plaintiff’s claims for contributory and vicarious copyright infringement fail
21 as a matter of law.

22 **B. Summary Judgment is Appropriate on Plaintiff’s Vicarious**
23 **Copyright Infringement Claim Because TTI Obtained No**
24 **Direct Financial Benefit From the Alleged Infringement**

25 Even if Plaintiff’s notices were effective at putting TTI on notice of the alleged
26 infringement—they were not—TTI is still entitled to partial summary judgment on
27 Plaintiff’s claim for vicarious infringement. For vicarious copyright infringement, in
28 addition to establishing direct infringement, Plaintiff must prove TTI “has (1) the

1 right and ability to supervise the infringing conduct and (2) a direct financial interest
2 in the infringing activity.”⁶ *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th
3 Cir. 2017) (citation omitted). The “essential aspect” of a “direct financial benefit” is
4 the existence of a “causal relationship” between the financial benefit to the defendant
5 and the infringing activity at issue. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th
6 Cir. 2004).

7 Plaintiff alleges TTI received financial benefits from the alleged infringement
8 because the “use/display of the Work on the Defendant’s platform . . . acted as a draw
9 for other customers/end-user to engage with Defendant,” allegedly resulting in
10 “increased traffic” to TikTok, which allegedly increased advertising revenue and
11 sales on TikTok Shop. Dkt. 46 ¶ 76. After discovery, Plaintiff has no evidence to
12 support this tenuous allegation.

13 While a financial benefit may exist “where the availability of infringing
14 material acts as a draw for customers,” *e.g. A&M Records v. Napster, Inc.*, 239 F.3d
15 1004, 1023 (9th Cir. 2001), there must be “a causal relationship between the
16 infringing activity” and the “draw” to consumers. *Ellison*, 357 F.3d at 1079. In the
17 online service provider context, “use of Defendants’ services for direct infringement
18 alone is insufficient to establish a causal relationship between the underlying
19 infringing activity and Defendant’s financial benefit.” *Louis Vuitton Malletier, S.A.*
20 *v. Akanoc Sols., Inc.*, 591 F. Supp. 2d 1098, 1110 (N.D. Cal. 2008) (citing *Ellison*,
21 357 F.3d at 1079). Rather, “a plaintiff must show that ‘customers either subscribed
22 *because of the available infringing material* or canceled subscriptions because it was
23 no longer available.’” *Id.* (quoting *Ellison*, 357 F.3d at 1079) (emphasis added);
24 *Giganews, Inc.*, 847 F.3d at 674 (holding “Perfect 10 was required to provide
25

26
27 ⁶ Plaintiff cannot establish direct infringement in this case because each of the alleged
28 acts of infringement constitutes fair use. Defendant will address this issue in response
to Plaintiff’s motion for summary judgment.

1 evidence that customers were drawn to Giganews’s services because of the infringing
2 [] material at issue”).

3 Plaintiff has *zero* evidence that users were drawn to TikTok due to use of the
4 Asserted Works. Indeed, Grecco admitted Plaintiff has “no facts to suggest they were
5 drawn to TikTok because of these videos.” Grecco Dep. at 254:14–20, 233:20–23;
6 DSOUF No. 69. Grecco testified Plaintiff has no idea when or why users joined
7 TikTok, much less whether they joined because of the alleged infringement. *Id.* Nos.
8 67–70. Grecco further testified that “no one goes to TikTok for one video[, t]hey go
9 to be entertained” and that users are “on TikTok to be on TikTok to look at what
10 TikTok – what content TikTok has to offer.” Grecco Depo. at 222:16–17, 248:12–
11 14; DSOUF Nos. 70. That users are allegedly drawn to TikTok to view a panoply of
12 content is insufficient—there are billions of videos on Tiktok and the use of single
13 photographs for a matter of seconds in 20 videos and a handful of profile picture
14 thumbnails simply does not move the needle. *Perfect 10, Inc. v. Giganews, Inc.*, No.
15 CV 11-07098-AB (SHx), 2014 U.S. Dist. LEXIS 183590, at *11 (C.D. Cal. Nov. 14,
16 2014) (finding that because the universe of content available on Giganews’ website
17 is “broad and diverse . . . any conclusion that subscribers were ‘drawn’ to Giganews’
18 services as a result of the availability of [plaintiff’s] content would be pure
19 speculation”), *aff’d Giganews, Inc.*, 847 F.3d 657.

20 Courts in this circuit routinely grant summary judgment on vicarious copyright
21 infringement on these facts. *E.g.*, *Giganews, Inc.*, 847 F.3d at 674 (granting summary
22 judgment where “there was no evidence indicating that anyone subscribed to
23 Giganews because of infringing Perfect10 material”); *see also Louis Vuitton*
24 *Malletier*, 591 F. Supp. 2d at 1110 (granting summary judgment where plaintiff did
25 not “offer any evidence showing that customers sought or abandoned Defendants’
26 services” based on the infringement).

27 Plaintiff also alleges TTI profited from advertising and sales through TikTok
28 Shop. Dkt. 46 ¶ 76. However, these theories are premised on the alleged

1 infringement being a draw to users, which Plaintiff admittedly cannot prove.
2 DSOUF Nos. 67–70. Plaintiff further concedes the Asserted Works have not been
3 used in advertisements on TikTok. *Id.* No. 71. Finally, none of the Asserted Works
4 were used on TikTok Shop or to sell any products. *Id.* Nos. 72–73.

5 The only other potential revenue stream that Plaintiff identified is the TikTok
6 Creator Program. *See* DSOUF No. 74–75. But the undisputed facts show that even
7 if Program participants can potentially earn revenue from their TikTok posts, TTI
8 itself does not generate profit from such content. *Id.* Nos. 74–76.

9 In sum, Plaintiff has no “evidence showing that [TTI] made more money” by
10 “allow[ing] infringement to continue” and its vicarious infringement claim fails.
11 *Louis Vuitton Malletier*, 591 F. Supp. 2d at 1110.

12 **C. Plaintiff is Not Entitled to Recover Defendant’s Profits or**
13 **Actual Damages**

14 Copyright owners may elect to recover either (1) “actual damages” and “any
15 profits from the infringer that are attributable to the infringement and are not taken
16 into account in computing the actual damages” or (2) statutory damages.
17 17 U.S.C. §§ 504(b)–(c). This Circuit has determined that recoverable profits may
18 include both “direct profits—those that are generated by selling an infringing
19 product—and indirect profits—revenue that has a more attenuated nexus to the
20 infringement.” *Mackie v. Rieser*, 296 F.3d 909, 914 (9th Cir. 2002). Actual damages
21 are “the extent to which the market value of a copyrighted work has been injured or
22 destroyed by an infringement.” *Id.* at 917 (quotation omitted).

23 *1. Plaintiff is Not Entitled to Recover Defendant’s Profits Because*
24 *There are No Profits Attributable to the Alleged Infringement*

25 Plaintiff asserts entitlement to “disgorgement of Defendant’s profits from
26 infringement of the Work.” Dkt. 46 ¶¶ 80, 99. “[T]o survive summary judgment on
27 a demand for indirect profits, . . . a copyright holder must proffer sufficient non-
28 speculative evidence to support a causal relationship between the infringement and

1 the profits generated indirectly from such an infringement.” *Mackie*, 296 F.3d at
2 915–916. The causal nexus requires that the infringement “caused the profits that
3 the infringer generated.” *Id.* at 911. Even where a causal connection is shown, “the
4 copyright owner is required to do more initially than toss up an undifferentiated gross
5 revenue number.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711 (9th
6 Cir. 2004); *see also Davis v. Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001) (the plaintiff
7 has the burden to establish “revenues reasonably related to the infringement, not
8 unrelated revenues”).

9 Discovery confirmed TTI did not earn any direct or indirect profits from the
10 alleged infringement. It is undisputed TTI has not “sold” anything in connection with
11 the alleged infringement or otherwise derived any profits from the third-party use of
12 the Asserted Works. DSOUF Nos. 77–79. None of the Asserted Works was used in
13 any advertisements, nor to sell products on TikTok Shop. *Id.* Nos. 71–73. There are
14 no “direct profits” at issue in this case. *See Griffio v. Oculus Vr*, No. SA CV 15-1228-
15 DOC MRWx, 2018 U.S. Dist. LEXIS 237382, at *24–25 (C.D. Cal. Sep. 18, 2018)
16 (finding at the summary judgment phase that plaintiff “cannot recover the direct
17 profits of the infringer” where the infringer did not sell the copyrighted video but
18 used it to promote other products); *Associated Residential Design, Ltd. Liab. Co. v.*
19 *Molotky*, 226 F. Supp. 2d 1251, 1255–56 (D. Nev. 2002) (finding at summary
20 judgment there were no “direct profits” where defendant used plaintiff’s copyrighted
21 architectural plans but had not sold the plans or a home embodying the plans). *Evox*
22 *Prods., LLC v. Cal. Rent-A-Car, Inc.*, No. CV-15-8046-MWF (RAOx), 2016 U.S.
23 Dist. LEXIS 194720, at *34 (C.D. Cal. July 26, 2016) (granting summary judgment
24 on direct profits where defendant used plaintiff’s photographs of cars but did not sell
25 or license those photographs). Summary judgment is appropriate on TTI’s non-
26 existent direct profits attributable to the alleged infringement.

27 As for indirect profits, Plaintiff merely contends TTI derives revenue from
28 advertisements on TikTok. Dkt. 46 ¶ 76. But Plaintiff’s only “evidence” relating to

1 these revenues is Grecco's self-serving testimony regarding the amount of TTI's
2 projected revenues for a single year, which he purportedly obtained online from an
3 undisclosed source.⁷ DSOUF Nos. 80–83. Evidence of TTI's projected or total
4 advertising revenues, even if properly before the Court, is insufficient to show any
5 relation between those revenues and the alleged infringement. *Polar Bear*, 384 F.3d
6 at 711 (the “copyright owner is required to do more initially than toss up an
7 undifferentiated gross revenue number”); *Davis*, 246 F.3d at 160 (affirming summary
8 judgment on defendant's profits where plaintiff only offered defendant's total
9 revenues).

10 As discussed above, Plaintiff has no evidence that the alleged infringement
11 drew users to Tiktok or otherwise had any effect on TTI's revenues. Plaintiff has no
12 evidence of how TTI's revenues changed over time, how much of TTI's revenues are
13 attributed to user-generated content, and, most importantly, whether any of TTI's
14 advertising revenues are attributed to use of the Asserted Works. DSOUF Nos. 80–
15 83. Plaintiff's contention that the Asserted Works led to increased advertising
16 revenues for TTI is therefore entirely speculative, especially in light of the billions
17 of videos on TikTok, as well as Grecco's testimony that users join TikTok for a
18 variety of reasons completely unrelated to his photographs. *See Mackie*, 296 F.3d at
19 916 (granting summary judgment because plaintiff's indirect profits theory was
20 speculative where there are “endless permutations to account for an individual's
21 decision to subscribe to [defendant's] series, reasons that have nothing to do with the
22 artwork in question”). Plaintiff fails to establish a causal connection between the
23 alleged infringement and any of TTI's revenues.

24 In sum, Plaintiff has not presented any evidence to show any direct or indirect
25 profits attributable to the alleged infringement, and the Court should grant summary
26 judgment on this issue.

27 ⁷ Grecco's testimony summarizing an unknown source is clearly inadmissible
28 hearsay.

2. *Plaintiff has No Objective and Non-Speculative Evidence of its Actual Damages*

Plaintiff bears the burdens of proving actual damages and a causal connection between the alleged infringement and those damages. *Polar Bear*, 384 F.3d at 708. Actual damages are “the extent to which the market value of a copyrighted work has been injured or destroyed by an infringement.” *Mackie*, 296 F.3d at 917 (quotation omitted). Market value is determined by a hypothetical license approach, looking at what a willing buyer would have been reasonably required to pay to a willing seller for the copyrighted work. *Id.* “[T]he market value approach is an objective, not a subjective, analysis” and “speculative claims of damages are to be rejected.” *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (citing *Mackie*, 296 F.3d at 917). Absent objective evidence relating to a “history of granting similar licenses” or benchmark industry licenses, the copyright owner’s actual damages are speculative. *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1093 (9th Cir. 2014) (affirming judgment granted as a matter of law where plaintiff “failed to provide sufficient objective evidence of the market value of the hypothetical license”). Plaintiff has failed to produce objective evidence to support its actual damages.

Plaintiff claims its damages are calculated “by multiplying the license it would have charged by the number of years the photographs were published.” DSOUF No. 84; Keyes Decl., Ex. 7. The only method disclosed by Plaintiff for determining the “license it would have charged” is by considering “the license fee . . . as calculated by the shopping cart tool on Plaintiff’s website.” DSOUF No. 85; Keyes Decl., Ex. 8 (Response to Interrogatory Nos. 4 and 5 (“Plaintiff’s actual damages consists of the licensing fees shown by the shopping cart feature on Plaintiff’s website.”)). Yet, Plaintiff admits “no one uses the cart” and Plaintiff granted *zero* licenses through the cart in the years 2021–2024. DSOUF Nos. 86–90. In fact, Plaintiff admits “in the entire history” of offering licenses through the website there was “only one time someone used the cart” for an unrelated and irrelevant

1 image of an Olympic athlete. Grecco Depo. at 266:25–267:5, 267:1–8; DSOUF Nos.
2 91–92. In addition, Plaintiff has not disclosed or produced any evidence showing
3 what the purported license rate shown in the cart is, stating only that it depends on
4 the user. Keyes Decl., Ex. 8 (Response to Interrogatory No. 4). If anything, because
5 no one has licensed the Asserted Works using the cart, any license amount shown in
6 the cart is merely what Grecco subjectively “thought he should have earned or wished
7 he had charged” and is not objective evidence that consumers are willing to license
8 the Asserted Works at those rates. *Jarvis*, 486 F.3d at 534. For all these reasons,
9 Plaintiff’s reliance on the cart is speculative and insufficient to establish the market
10 value for the Asserted Works.

11 Although the cart is the only method disclosed by Plaintiff to date for
12 determining the license fees it purportedly would have charged TTI, Plaintiff did
13 produce seventeen “license” agreements during discovery that it might contend are
14 relevant to show its actual damages. DSOUF No. 94. These licenses are also
15 insufficient as a matter of law to establish the market rate for the Asserted Works.

16 *First*, of the seventeen licenses produced by Plaintiff, twelve are “retroactive
17 licenses,” meaning Plaintiff identified an allegedly infringing use and entered into
18 the license to “settle a potential dispute” with the licensee. DSOUF No. 95–76;
19 Grecco Depo. at 288:11-15. These forced “licenses” made under threat of litigation
20 are akin to settlement agreements and are negotiated based on several factors to
21 resolve infringement claims. DSOUF No. 96–97. Accordingly, they “do not show
22 what the parties would have willingly negotiated” in the open market. *Attachmate*
23 *Corp. v. Health Net, Inc.*, No. C09-1161 MJP, 2010 U.S. Dist. LEXIS 156918, at *3
24 (W.D. Wash. June 18, 2010); *Dongxiaoyue v. Chordiant Software*, No. C 08-00019
25 JW, 2010 U.S. Dist. LEXIS 159634, at *10 (N.D. Cal. Apr. 22, 2010) (excluding
26 prior settlement agreements and licenses made under threat of litigation because they
27 “do not provide an accurate reflection of what a willing licensor would do in an arm’s
28 length transaction”); *Latin Am. Music Co. v. Spanish Broad. Sys., Inc.*, 232 F. Supp.

3d 384, 392-93 (S.D.N.Y. 2017) (finding a “settlement agreement is not probative of what Plaintiff’s actual damages might be”). Plaintiff refused to produce settlement agreements from its hundreds of prior lawsuits because they are “not relevant” and confirmed it will not rely on prior settlement agreements for purposes of calculating its damages. DSOUF Nos. 98–100. Under Plaintiff’s own logic, the retroactive licenses are settlement agreements and likewise irrelevant to establishing the market value of the Asserted Works.

Second, the five actual prior licenses Plaintiff produced are neither comparable nor probative of the market value of the Asserted Works. DSOUF Nos. 101–112. Three of the licenses admittedly do not relate to any of the Asserted Works at issue in this case, *id.* Nos. 102, 104, and 106, and cannot establish the market rate of the Asserted Works. Another license is with a German magazine and Plaintiff did not know whether it relates to any Asserted Work. *Id.* Nos. 109. The single remaining license relates to the Seventh Photograph, but it is for use of the photograph on “businessinsider.my,” a Malaysian website, *id.* Nos. 110–112, and is not comparable to a license that would be entered in this case (i.e., one that would permit a TikTok user to use the photograph on TikTok). *See Oracle*, 765 F.3d at 1093. Additionally, Plaintiff has not provided any information relating to its negotiations with its licensees, the circumstances for entering these licenses, or how the licensing fees were calculated. DSOUF Nos. 98.

Because Plaintiff has failed to present evidence relevant to the market rate of the Asserted Works, its actual damages are entirely speculative. This is unsurprising because Grecco testified “I’m opting for statutory damages” and “we’re asking for statutory damages.” DSOUF No. 113, Grecco Depo. at 228:18–25; 230:14–22 (adding in response to a question about the absence of actual damages, “[T]hat’s why God created statutory damages”). While Plaintiff has not yet formally elected statutory damages, its complete failure to present “evidence of actual damages is a de facto election of statutory damages.” *See Latin Am. Music Co.*, 232 F. Supp. 3d

1 at 392 (granting summary judgment on actual damages). The Court should grant
2 summary judgment on this issue.

3 **V. CONCLUSION**

4 Plaintiff's claims of secondary copyright infringement liability required
5 Plaintiff to send TTI takedown notices that fully complied with Subsection 512(c)(3)
6 of the DMCA. But Plaintiff's takedown notices were admittedly sent without *any*
7 consideration of whether the allegedly infringing uses were fair use—which is
8 required by the Ninth Circuit even if serial litigant like Plaintiff regards it as “BS.”
9 Plaintiff's failure to provide TTI notice of infringement via legally effective
10 takedown notices warrants granting summary judgment on all of Plaintiff's claims.
11 Additionally, summary judgment is warranted on Plaintiff's claim for vicarious
12 infringement due to an absence of direct financial benefit to TTI, as well as on the
13 issues of TTI's profits and Plaintiff's actual damages, which there is no non-
14 speculative evidence to support.

15 Dated: August 22, 2025

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L.R. 11-6.2. CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant TikTok Inc. certifies that
this brief contains 6,870 words, which complies with the word limit of L.R. 11-6.

Dated: August 22, 2025

/s/ J. Michael Keyes
J. Michael Keyes, SBN 262281

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2025, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, which shall send notification of such filing to all counsel of record. Any counsel of record who has not consented to electronic service through the Court's CM/ECF system will be served by electronic mail.

/s/ J. Michael Keyes
J. Michael Keyes, SBN 262281